IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 253 of 1992

For Approval and Signature:

Hon'ble MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

JEETSING M SOLANKI

Versus

STATE OF GUJARAT

Appearance:

MR AK CHITNIS for Petitioners

MR. Y.F. MEHTA, A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE N.J.PANDYA and
MR.JUSTICE H.L.GOKHALE

Date of decision: 26/11/96

ORAL JUDGEMENT

1. This appeal arises out an order of conviction passed by the learned Additional Sessions Judge, Baroda, in Sessions Case No.172 of 1991. Two accused were facing charge of murder, i.e. under Section 302, I.P.C. read with Section 34, I.P.C. The charge is at Ex.3, paper

book page 7. The main part is said to have been played by original accused No.1, who is appellant No.1 before us, by causing fatal death injury on the deceased-Ganpatsinh, who died soon after the incident which happened on 28.6.1991. The incident happened at about 12.30 P.M. approximately.

2. By way of antecedents, according to the prosecution case, on the previous day, accused No.1 had picked up quarrel with the deceased on account of the deceased having borrowed a pair of bullocks from one Ratansinh. It has come on record that the deceased has no bullocks of his own and, therefore, he had borrowed one paid for his own agricultural operation.

3. Before the Trial Court, the prosecution relied on two eye-witnesses. One of them is a child witness, P.W. 3 (Ex.15), page 13 of the paper book. His name is Ranjitsinh and he is the son of the deceased. His age at the time of recording of the evidence was 12 years. In clear terms, he has described the incident. He stated that accused No.1 had given a blow on the head of his father while accused No.2, carrying stick, had give a blow with it on one of the arms of the deceased.

4. The said witness is supported by another witness-Amarsinh (Ex.16), page 16 of the paper book. He also narrated the incident almost in the same manner.

5. We are not required to go into the details of the case of original accused No.1-Jeetsinh, as he died during the pendency of the appeal on 24.1.1996 and this fact has come on record by way of an application by the surviving appellant, being Misc. Criminal Application No.655 of 1996. On 19.2.1996, this Court passed an order for releasing the surviving accused on temporary bail. As original accused No.1 had died on 24.1.1996, the appeal does not survive with regard to him.

6. With regard to the surviving accused, the only part played by him is that of having given a stick blow and, therefore, by pressing Section 34 of the I.P.C. into service, there is no question of convicting him for the offence under Section 302. With regard to the injury caused by the stick, there is no outward trace to be found in the P.M. note nor has the doctor deposed about the same. Assuming that in absence of any material, it would attract Section 34 of I.P.C., the act said to have been perpetrated by accused No.2 is that of simple blow punishable under Section 323, I.P.C.

7. With regard to the common intention, there is no evidence at all. The only thing that emerges from the record is that accused Nos.1 and 2 respectively father and son were coming towards the deceased, who had gone to water his bullocks, obviously his borrowed bullocks. When the deceased was returning after watering the bullocks, both the accused came from the opposite direction and the incident happened. The least that was expected of the younger of the two, namely, the surviving appellant was to carry a weapon of the same type as was being carried by the father. The father had the intention of killing the deceased and, therefore, was carrying the axe. The weapon like stick would hardly fit the description or would certainly not be in conformity with the previous intention of these two persons. Secondly, the blow that has been given is also on the arm, which is definitely not a vital part of the body. The act which is said to have been carried in furtherance of the common intention belies the theory of sharing common intention of causing death. Under the circumstances, we are not able to agree with the view of the learned Trial Judge that the surviving accused-appellant No.2 herein was sharing common intention with the deceased-accused-appellant No.1 of causing death. The conviction of the surviving accused is, therefore, only under Section 323. The conviction of appellant No.2-Kanaksinh Jeetsinh Solanki under Section 302 is set aside. The appellant-accused No.2 has already undergone incarceration since the date of the incident. He is, therefore, ordered to be released forthwith, if not required in any other case. Appeal is, accordingly, allowed.

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